SUPREME COURT, U.S.
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No. 94-1930

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

THE ASSOCIATION OF NATIONAL ADVERTISERS, INC., *et al.*,
Petitioners,

v.

DANIEL LUNGREN, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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Date: July 26, 1995

ZIPP

QUESTION PRESENTED

Amicus Washington Legal Foundation addresses the following question only:

May a state, consistently with the First Amendment to the Constitution, prohibit manufacturers and distributors from using specific language about environmental attributes of their consumer goods, except as specifically prescribed by the state, even though the language is truthful and not misleading?

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

The Washington Legal Foundation (WLF) is a nonprofit public interest law and policy center with more than 100,000 supporters nationwide, including many in California. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial portion of its resources to promoting the rights of individuals and businesses to speak freely on commercial matters. To that end, WLF has appeared before this Court

and other courts around the country in cases dealing with commercial speech rights. *See, e.g., 44 Liquormart, Inc. v. Rhode Island*, No. 94-1140, *cert. granted*, 115 S. Ct. 1821 (1995); *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585 (1995); *Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993); *Peel v. Attorney Registration and Disciplinary Comm'n of Ill.*, 496 U.S. 91 (1990); *Pacific Gas and Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1 (1986).

WLF is concerned by the increased willingness of state and local governments, in the name of consumer welfare, to regulate the content of commercial speech. States undoubtedly have a strong interest in preventing consumers from being misled by fraudulent advertising. But WLF is very wary of government attempts to curb speech not for the purpose of preventing fraud but rather for the purpose of promoting a wide range of goals thought to be socially desirable -- such as increased recycling of resources. WLF believes that the interests of our free market economy -- as well as the demands of our Constitution -- are best served by permitting truthful commercial speech to flow freely. State and local governments that wish to promote worthy causes should do so by speaking out themselves, not by preventing others from speaking.

WLF submits this brief in support of Petitioners with the written consent of all parties. The written consents are on file with the Clerk of the Court. WLF's brief is timely filed under Rule 37.2, in that it is being filed within the time allowed for filing briefs in opposition to the Petition.

STATEMENT OF FACTS

In the interests of judicial economy, WLF hereby adopts the Statement of the Case contained in the Petition.

In brief, this Petition involves a challenge to a California statute that limits the rights of manufacturers and distributors to describe their products as "ozone friendly," "biodegradable," "photodegradable," "recyclable," or "recycled." They are expressly barred from describing their products in those terms unless the products meet specific definitions established by the California state legislature. *See* California Business and Professions Code § 17508.5.

As the district court noted, § 17508.5 forbids the use of these five terms -- except in the manner approved by the legislature -- even in situations where their use is entirely accurate (Pet. App. 50a) or where the speaker's precise meaning in using the terms is explained to consumers in the labeling or advertising of the product. Pet. App. 51a-52a. Indeed, § 17508.5 takes no cognizance of whether consumers are misled or confused by the terms but, rather, strictly forbids their use without regard to context.

Petitioners filed suit in the U.S. District Court for the Northern District of California in February 1992, alleging *inter alia* that § 17508.5 violated their First Amendment rights by impermissibly restricting speech. In a December 1992 opinion granting summary judgment to Respondents, the district judge held that § 17508.5 violated no First Amendment rights. Pet. App. 34a-59a.[1] The court held that § 17508.5 imposed restrictions on commercial speech only and that the statute should be upheld under the test for

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[1] The district court did, however, strike down (on due process grounds) the prohibition against use of the word "recyclable," on the basis that § 17508.5's definition of that term was overly vague. Pet. App. 57a-58a. Respondents did not appeal from that portion of the district court's decision.

commercial speech restrictions established by *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557 (1980). Pet. App. 38a-53a.

On appeal, a divided panel of the U.S. Court of Appeals for the Ninth Circuit affirmed. Pet. App. 1a-33a. The appeals court identified two "substantial" interests asserted by California in support of its speech restrictions: a desire to regulate potentially misleading speech and to promote resource conservation. Pet. App. 16a. The court held that § 17508.5 directly advanced those interests (*id.*, 16a-22a) and that the statute was narrowly tailored, in that California could not have accomplished its purposes in a far-less-restrictive manner. *Id.*, 22a-25a. Petitioners seek review of the Ninth Circuit's decision in this Court.

REASONS FOR GRANTING THE WRIT

I. THE IMPORTANT COMMERCIAL SPEECH ISSUES RAISED BY THIS CASE MERIT COURT REVIEW, PARTICULARLY IN LIGHT OF THE CONFUSION THEY HAVE ENGENDERED WITHIN THE COURTS OF APPEALS

This case raises an issue of exceptional importance -- the circumstances under which the government may impose a total ban on truthful but *potentially* misleading commercial speech. This is an issue on which the federal appeals courts are divided. The Ninth Circuit held in this case that a total ban is permissible in order to guard against potentially misleading speech, even when the government could also accomplish its purposes in a manner less burdensome on First Amendment rights -- such as by imposing disclaimer requirements in order to eliminate any possibility that listeners could be misled. Pet. App. 22a-25a. The

Sixth and Eleventh Circuits have reached contrary conclusions. The Court should grant the writ in order to resolve this conflict.

This case is a particularly appropriate vehicle for resolution of the conflict because of the extraordinary level of national attention it has received. California's near-ban on use of four words used in connection with "green" advertising[2] followed closely on the heels of an investigation into allegedly deceptive "green" advertising, conducted by an ad hoc Task Force of State Attorneys General. Other states have monitored these proceedings closely, and the States of Massachusetts, Minnesota, Tennessee, and Washington appeared as *amici curiae* in the Ninth Circuit in support of California. The pendency of this suit has placed on hold efforts by other states to impose similar restrictions on "green" advertising, but it is generally understood that those efforts will go forward if the California statute is upheld. *See, e.g.*, Brief in Opposition of Respondents Californians Against Waste and the Environmental Defense Fund (the "EDF Respondents") at 7 ("other states [are] poised to decide what form of regulation to adopt to address the same problems as those plaguing California"). Thus, the limits on a state's power to control "green" advertising is an issue of overriding significance throughout the nation; in light of the important First Amendment values at stake, delay in bringing the issue before the Court would serve no useful purpose.

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[2] "Green" advertising is the name generally ascribed to advertising that seeks to promote products based on their environmental attributes. Such advertising proceeds from the assumption that consumers are willing to pay more for a product thought to be "friendlier" to the environment than competing products.

The conflict between the decision in this case and decisions of the Sixth and Eleventh Circuits centers on the third and final prong of the *Central Hudson* test: whether a regulation of commercial speech is narrowly tailored to serve its intended purpose.[3] The Court has made clear that a regulation can pass muster under *Central Hudson*'s third prong even if it is not the least restrictive measure that could effectively protect the government's interest. *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 476-77 (1989). Rather, *Central Hudson* requires that there be a "reasonable" fit between the regulation and its intended purpose; that the regulation be "in proportion to the interest served" and employ a means "narrowly tailored" to achieve the desired objective. *Fox*, 492 U.S. at 480. Left unresolved by *Fox* was an issue squarely raised by this case: whether a total ban on speech can qualify as a "narrowly tailored" regulation where the state's interests can be fully served in a far-less-drastic manner -- such as by imposing disclaimer requirements on the speaker.

The Ninth Circuit decided that issue by upholding the total ban. It held that product manufacturers and producers could be absolutely prohibited from promoting their products through use of the words "ozone friendly," biodegradable," "photodegradable," and "recycled," unless the products met stringent requirements set forth in § 17508.5.

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[3] Under the three-pronged *Central Hudson* test, government may regulate commercial speech (*i.e.*, speech that proposes a commercial transaction) that neither is false nor concerns an unlawful activity *only* if: (1) it asserts a substantial interest in support of its regulation; (2) it demonstrates that the restriction on commercial speech "directly and materially advances" that interest; and (3) the regulation is narrowly drawn. *Florida Bar v. Went For It, Inc.*, 63 U.S.L.W. 4644, 4646 (U.S. June 21, 1995).

Pet. App. 22a-25a. The appeals court dismissed Petitioners' more narrowly drawn alternative: a regulation mandating qualifying language to clarify use of the regulated terms not conforming with § 17508.5.[4] The Ninth Circuit did not dispute that Petitioners' suggested alternative would adequately serve California's asserted interests, but held nonetheless that the existence of that alternative did not in any way suggest that § 17508.5 flunked the third prong of the *Central Hudson* test.

The Eleventh Circuit reached the opposite conclusion in *Abramson v. Gonzalez*, 949 F.2d 1567 (11th Cir. 1992). Under challenge in *Abramson* was a Florida statute that prohibited unlicensed psychologists from advertising their services using the word "psychologist" -- even though unlicensed psychologists were free under Florida law to practice their profession. The Eleventh Circuit recognized that it was potentially misleading for the plaintiffs to hold themselves out as "psychologists" because a consumer might be led to believe that they were licensed as such by the state. The appeals court nonetheless held that, under *Fox*, Florida's ban on use of the word "psychologist" could not qualify as a narrowly tailored regulation of commercial speech -- because a much more narrowly tailored regulation (requiring the plaintiffs to disclose their unlicensed status) would fully satisfy Florida's concerns about the potentially misleading nature of the speech. *Abramson*, 949 F.2d at 1575-77. The court held, "[A]lthough a state may prohibit

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[4] Petitioners suggested, for example, that a manufacturer be permitted to advertise that one of its product consists of "100% recycled paper, 5% of which is post-consumer waste" if that statement is true. Under § 17508.5, the word "recycled" may never be used in connection with a product unless the product contains "at least 10 percent, by weight, postconsumer material."

misleading advertising entirely, it *may not place an absolute prohibition on potentially misleading information if the information may also be presented in a way that is not deceptive.*" *Id.* at 1576 (citing *Peel*, 496 U.S. at 103) (emphasis in original).[5]

The decision below also conflicts with a Sixth Circuit decision, *Parker v. Commonwealth of Ky.*, 818 F.2d 504 (6th Cir. 1987). *Parker* struck down a Kentucky law that barred general dentists from holding themselves out as specialists in fields (such as orthodontics, oral surgery, and periodontics) in which they were permitted to perform specialized services. The Sixth Circuit held that the ban was not "narrowly tailored" because even though consumers might mistakenly conclude that general practitioners were licensed as specialists in orthodontics:

> It is . . . evident that these terms [such as "orthodontics"] and the information they convey can be presented in a way which does not mislead the public into believing that a general practicing dentist is a dentist with an orthodontia specialty license. A disclaimer to such an effect would adequately address the state's concern.

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[5] Just as a manufacturer could avoid § 17508.5's speech ban by altering the composition of its products in order that they might come within the statute's definitions of "recycled," etc., so too the plaintiffs in *Abramson* could have avoided Florida's prohibition on use of the word "psychologist" by obtaining psychology licenses from the state. The existence of that method by which to avoid the Florida statute's absolute ban on commercial speech did not, however, affect in any way the Eleventh Circuit's conclusion that the ban was not "narrowly tailored" for purposes of First Amendment analysis.

Parker, 818 F.2d at 510-11. The court added, "To prefer more disclosure over an outright ban on particular forms of advertising not only protects the advertiser's right to communicate, but also protects the general public's interest in receiving information." *Id.* at 509.[6]

In sum, the Ninth Circuit's decision is in irreconcilable conflict with *Abramson* and *Parker*. The latter two cases hold -- contrary to the Ninth Circuit's decision -- that a ban on potentially misleading speech can never constitute a "narrowly tailored" means of regulating the speech so long as the government's interest in guarding against misleading speech can be vindicated through required use of disclaimers. The Court should grant the writ to resolve that conflict, as well as to address an issue of significant national importance.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT

The petition for a writ of certiorari should be granted for the additional reason that the Ninth Circuit's decision conflicts with numerous decisions of this Court with regard to what constitutes a "narrowly tailored" regulation under the *Central Hudson* test.

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[6] Admittedly, *Parker* was decided two years before *Fox*, the Supreme Court decision which sets forth in greatest detail what constitutes a narrowly tailored regulation for purposes of the *Central Hudson* test. Nonetheless, nothing in *Parker* is inconsistent with *Fox*. Moreover, *Parker* was decided one year after (and cites to) *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), the commercial speech decision upon which the Ninth Circuit most heavily relied in determining that § 17508.5 was narrowly tailored. *See* Pet. App. 24a.

In support of its assertion that § 17508.5's outright speech ban is a "narrowly tailored" remedy despite the existence of significantly narrower alternatives, the appeals court argued:

> The second suggested alternative, a statute requiring "more speech", runs headlong into the Court's rejection of such an approach to fourth prong analysis in *Fox*, 492 U.S. at 479. As Justice Scalia observed for the majority in *Fox*,
>
> > In *Posadas*, for example, where we sustained Puerto Rico's blanket ban on promotional advertising of casino gambling to Puerto Rican residents, we did not first satisfy ourselves that the governmental goal of deterring casino gambling could not adequately have been served (as the appellant contended) 'not by suppressing commercial speech that might *encourage* such gambling, but by promulgating additional speech designed to *discourage* it.'
>
> [*Fox*, 492 U.S. at 479], *quoting Posadas*, 478 U.S. at 344 (emphasis in original).

Pet. App. 24a.

The Ninth Circuit's argument takes Justice Scalia's statement completely out of context and overlooks significant distinctions between *Posadas* and this case that render *Posadas* wholly inapplicable to this case.

The quotation from *Fox* was pulled from a lengthy section of the opinion in which Justice Scalia was attempting to demonstrate that the Court's previous commercial speech

cases could not reasonably be read as limiting the definition of a "narrowly tailored" remedy (for *Central Hudson* purposes) to ones employing the "least restrictive means." *See Fox*, 492 U.S. at 475-481. The Court reviewed a long series a commercial speech decisions to support that conclusion; the quoted reference to *Posadas* appeared in roughly the middle of that series. The reference was nothing more or less than one more piece of evidence that *Central Hudson* did not incorporate a "least restrictive means" requirement. *Id.* at 479.

Contrary to the impression left by the Ninth Circuit, Justice Scalia's discussion of *Posadas* was not a "rejection" of Petitioners' argument that the existence of significantly more narrowly tailored alternatives to a total ban on speech demonstrates that the ban is not "narrowly tailored." *Fox* was an attempt to provide a workable, general definition of a "narrowly tailored" commercial speech regulation, not an attempt to determine precisely when and under what conditions a total ban on speech can constitute a "narrowly tailored" regulation.

Moreover, nothing in *Posadas* itself supports an argument that § 17508.5's absolute ban on speech is a narrowly tailored speech regulation. *Posadas* involved a challenge to a Puerto Rican law that prohibited Puerto Rican casinos from directing their advertisements to island residents; the law was designed as a means of reducing demand for gambling. The Court rejected the plaintiff's claim that this blanket ban was not narrowly tailored and that Puerto Rico should instead be forced to seek to accomplish its objectives by promulgating speech designed to discourage gambling. *Posadas*, 478 U.S. at 344. The Court said it would defer to the decision of the Puerto Rico legislature that government-mandated advertisements spotlighting the dan-

gers of gambling would not succeed in reducing demand, that "residents of Puerto Rico are already aware of the risks of casino gambling, yet would nonetheless be induced by widespread advertising to engage in such potentially harmful conduct." *Id.*

The crucial distinction between *Posadas* and the instant case involves the differing rationales underlying the government speech restrictions in the two cases. The restriction in *Posadas* involved an attempt to reduce demand for gambling, while the principal rationale underlying § 17508.5 is a desire to avoid potentially misleading speech.[7] *Posadas* upheld a blanket ban on speech as a "narrowly tailored" regulation on the very reasonable assumption that no amount of compelled speech regarding the evils of gambling would serve to counteract the social problems that would be created if casinos were permitted to advertise to island residents. But the Court

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[7] California also asserts an interest in using § 17508.5 to promote its environmental goals. The theory apparently is that manufacturers will begin producing more environmentally "friendly" products in reaction to § 17508.5, so that they will be permitted to include the otherwise-prohibited "green" words in their advertising. Suffice to say that Respondents have provided absolutely no evidence that manufacturers will react in this manner. It is far from obvious that they would do so. One would expect manufacturers to change the composition of their products in reaction to § 17508.5 only if the costs of such changes would be exceeded by the sales increases expected to be brought about through "green" advertising. Given the large costs usually associated with any change in a product's composition, it is far more likely that manufacturers would react by dropping their "green" advertising altogether or by resorting to use of environmental terms not covered by § 17508.5. Neither reaction would serve to promote California's environmental goals; indeed, the likely effect would be to decrease the quantity of pro-environment information being disseminated by manufacturers.

has *never* upheld a blanket ban as a "narrowly tailored" means of regulating speech whose only vice is that it is *potentially* misleading.

To the contrary, in case after case, the Court has held that a blanket speech ban is not a narrowly tailored means of regulating potentially misleading speech when disclaimer requirements can serve to eliminate any possibility that consumers will be misled. For example, in *Peel*, the Court rejected Illinois's attempts to ban all mention from an attorney's letterhead that he had been certified as civil trial specialist by the National Board of Trial Advocacy. While the Court agreed with Illinois that such information was potentially misleading, the Court said that the blanket ban was not narrowly tailored in light of evidence that a disclaimer requirement could eliminate all possibility of confusion. *Peel*, 496 U.S. at 106-109 (plurality opinion); *id.* at 111 (Marshall, J., concurring in the judgment).

Similarly, in *In re R.M.J.*, 455 U.S. 191 (1992), the Court struck down an effort to prohibit truthful attorney advertising in a Yellow Pages listing. The Court said, "States may not place an absolute prohibition on certain types of potentially misleading information, *e.g.*, a listing of practice areas, if the information may also be presented in a way that is not deceptive." *In re R.M.J.*, 455 U.S. at 203. In *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), the decision that established attorneys' First Amendment right to advertise, the Court explained that "the preferred remedy [for potentially misleading speech] is more disclosure rather than less." *Bates*, 433 U.S. at 375. While prohibiting Arizona from imposing a blanket ban on all attorney advertising, the Court explained that states were still free to require "some limited supplemen-

tation, by way of warning or disclaimer or the like, . . . so as to assure the consumer is not misled." *Id.* at 384.

In every case in which the Court has found that a blanket ban on some type of speech was, in fact, narrowly tailored, the interest asserted by the government was something other than a desire to prevent potentially misleading speech. In *Posadas*, the government interest was in reducing demand for gambling; in *Florida Bar*, it was a desire to protect the privacy of accident victims and to improve the image of attorneys; in *Ohralick v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), a blanket ban on in-person solicitations by attorneys was upheld as a means of protecting consumers from overbearing attorneys.

It is conceivable, of course, that there might be a case in which even an extensive disclaimer requirement would be insufficient to guard against potentially misleading speech. In such a case, a blanket ban on the potentially misleading speech might constitute a "narrowly tailored" regulation for *Central Hudson* purposes. Suffice to say that this is not such a case; we do not understand Respondents to contest that disclaimer requirements could eliminate all potential that consumers would be misled by green advertising. If, as proposed by Petitioners, they are permitted to advertise that their products are "recycled, 5% of which is post-consumer waste," there is very little likelihood of confusion.

Finally, we are unpersuaded by Respondents' reliance on other regulatory schemes which impose standardized definitions on certain terms such as "finance charge" and "Annual Percentage Rate." *See, e.g.*, California Brief at 3. Such regulatory schemes are clearly distinguishable from § 17508.5. They generally require that information

be formatted in a particular manner in order to reduce confusion; they do not forbid regulated firms from speaking altogether on certain subjects. No credit card company is forbidden from conveying its "Annual Percentage Rate"; no food distributor is forbidden from including nutritional information on labels. In contrast, California absolutely forbids manufacturers from discussing the "recycled" content of their products, except under very limited circumstances. A statute standardizing use of the term "recycled" (*e.g.*, specifying that the percentage of post-consumer material is to be based on weight, not on volume) would be unobjectionable, but that is a far cry from a statute that (as here) in many cases prohibits advertising regarding the percentage of post-consumer waste.

In sum, WLF requests that the court grant the writ in order to correct the Ninth Circuit's significant departure from this Court's commercial speech jurisprudence, particularly with respect to what constitutes a narrowly tailored regulation.[8]

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[8] WLF fully supports Petitioners' argument that the Ninth Circuit also departed from settled case law in determining that § 17508.5 passes the second prong of the *Central Hudson* test: the requirement that the government regulation directly *and materially* advance the government's asserted interest. Petitioners have well documented the essentially irrational nature of the § 17508.5 scheme. We note that in addressing the second *Central Hudson* prong, the Ninth Circuit failed acknowledge recent Supreme Court case law underscoring that the government bears a significant burden in coming forward with evidence of direct and material advancement of the government's interest. *See, e.g., Edenfield v. Fane* , 113 S. Ct. 1792, 1798 (1993).

CONCLUSION

WLF respectfully requests that the petition for a writ of certiorari be granted.

Respectfully submitted,

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Counsel wish to acknowledge the assistance of Dennis Chong, a second-year student at American University's Washington College of Law, in preparing this brief.